UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

BOISE CASCADE CORPORATION, and B E & K INDUSTRIAL SERVICES, A DIVISION OF B E & K CONSTRUCTION COMPANY, A WHOLLY OWNED SUBSIDIARY OF B E & K, INC. **Employer**		
and		**Case No. 15-RC-8354**
PAPER, ALLIED-INDUSTRIAL, CHEMICAL & ENERGY WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 4-1226[1] **Petitioner**		

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, hereinafter the "Act," a hearing was held before a hearing officer of the National Labor Relations Board, hereinafter the "Board."

Under Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record[2] in this proceeding, the undersigned finds:

1. The hearing officer's ruling are free from prejudicial error and are hereby affirmed.

2. The Petitioner contends that the Employer and Boise Cascade Corporation, herein called Boise, are joint employers of the employees in the petitioned-for unit.[3] The Employer and Boise maintain that the Employer is the sole employer of these employees.

[1] The names of the Employer and Petitioner appear as amended at the hearing.

The record shows that Boise operates a pulp and paper mill, hereinafter referred to as the site, in DeRidder, Louisiana. Dave Blencke, Vice President Southern Operations, is the highest-ranking Boise official at the mill. Fred Martin, the maintenance manager, reports to Blenck, and reporting to Martin are four superintendents, each of whom is responsible for several crews of employees.

The Employer, an Alabama corporation, provides maintenance and construction services for various customers, including Boise. Boise and the Employer are parties to a contract, pursuant to which the Employer agrees to provide services "in connection with expansions and modifications of existing production facilities, construction of new production facilities, and/or various other construction projects." The Employer employs approximately 80 permanent nonsupervisory employees at the site.

It is undisputed that the Employer and Boise are not commonly owned and do not share any officers or managers. Each company employs its own supervisors. Tommy Nelson, the site manager, is the highest-ranking Employer official at the site. Reporting to Nelson is the mechanical superintendent, the paint superintendent, the planning superintendent, and two electrical and instrumentation supervisors. Several other supervisors work below these individuals including two paint department supervisors, a scaffold department supervisor and five supervisors in the Employer's mechanical department.

Pursuant to the above-described contract, Boise reimburses the Employer for employee wages and pays the Employer an additional fee as part of a "cost-plus" arrangement. The Employer independently selects and administers its employees'

[2] Boise Cascade Corporation, the Employer, and the Petitioner filed briefs that were duly considered.

retirement plans, pension benefits, and health, disability, and group life insurance benefits.

Further, the Employer maintains its own job progression policies. However, before an employee can receive the wage increase that accompanies a promotion, the raise must be approved by Boise. Yearly cost of living raises must also be approved by Boise before they are implemented. If a dispute arises between the Employer and Boise regarding the amount of the yearly raise, they negotiate until they reach an agreement.

With regard to hiring, the above-described contract provides that the Employer's employees are "subject to Boise Cascade's prior approval." However, from the record it is clear that the Employer hires the employees it employs at the site without obtaining the approval of Boise.

The Petitioner is the bargaining representative of Boise's hourly employees. Accordingly, their terms and conditions of employment are set forth in the collective bargaining agreement between these parties. The employment conditions of the Employer's employees are described in its project handbook.

Boise and the Employer work out of separate offices, and both employ their own office staff. The Employer also maintains its own offsite training facility. Each company maintains its own tool room at the site. When the Employer's employees are unable to find tools in the Employer's tool room, they obtain them from the tool room maintained by Boise. Employees of the two companies use the same storeroom to get parts for equipment.

[3] As will be discussed in greater detail below, the Petitioner seeks to represent the maintenance employees employed by the Employer at the site.

The employees of the two companies work different shifts and enter the site through separate gates. The Employer's hourly employees are required to punch a time clock. Those employed by Boise are not. The uniforms worn by employees of the two companies also differ. The Employer's hourly employees wear blue hard hats bearing the Employer's name. The Employer's employees also have their own break room.

As noted above, the Employer is largely responsible for the training of its employees. However, the record shows that on isolated occasions, its employees have received on- the-job-training from Boise supervisors.

Similarly, while the Employer is generally responsible for disciplining its employees, the record revealed that on two occasions, Boise has had a very limited involvement in the Employer's disciplinary process. One incident occurred in April 1999 when James Blackman, contract coordinator employed by Boise, reported a safety violation by Paul Laughlin, one of the Employer's employees. This resulted in a reprimand. It is not clear whether Blackman requested that Laughlin be disciplined. Another incident occurred in early 2000. Russell Lyons, one of the Employer's employees, testified that on that occasion Charlie Lott, a supervisor employed by the Employer, informed him that Blackman had attended a meeting about a reprimand Lyons received.

There is little contact between employees of the two companies. The Employer's employees generally work in crews headed by the Employer's foremen, while those employed by Boise are directed by Boise's supervisors. There is little if any intermingling of crews, and those occasions in which crews from the two companies work together appear to be isolated. Chris Simmons, one of the Employer's electricians,

and Russell Lyons, one of its welders, each testified concerning an occasion in which crews of the two companies worked in concert. One was precipitated by a fire and the other involved the repair of a paper machine.

For two or three years, some of the Employer's employees and the Boise employees assigned to the mechanical pulping department have shared a building in which they do maintenance work. In that building, they share one of the more than 25 hoisters that Boise operates.[4]

With regard to work assignments, the record shows that Boise planners inform the Employer's planning department of the work that needs to be done. On a weekly basis, the planning department meets with the Employer's foremen to distribute and schedule the work assignments. The foremen then assign the work to their crews. The determination as to which employees will be assigned to a given crew is left to the Employer.

The Petitioner bases its contention that the Employer and Boise are joint employers upon its assertion that Boise's supervisors frequently direct the work of the Employer's employees. In support of this argument, the Petitioner called several employees who testified concerning certain instances in which they had received instructions from Boise's supervisors. It is clear from the record that these employees received their day-to-day direction from the Employer's foremen and that the occasions in which they received instructions from Boise's supervisors were isolated.

Charles Cooley, one of the Employer's millwrights testified concerning approximately seven instances during his 12 years of employment at the site in which he had received instructions from Boise's supervisors. Garner Maricle, a welder employed

at the site for two years, testified concerning a few incidents in which he received instructions from Boise's managers. In one incident, his foreman instructed him to see one of Boise's foremen concerning a repair that had to be made. The Boise foreman showed him what had to be done. Paul Laughlin, a mechanic with six years of service, testified concerning an occasion in which Boise's maintenance superintendent interrupted his work and directed him to check whether a roll was getting oil. He also asserted that during "call-outs, " occasions in which he is called at home on his days off and directed to come to work, his work is often directed by Boise's foremen. However, the Employer's supervisors make the call and order him to appear at work. Joel Evans, an electrician who has worked at the site for nine years, testified that he was sent to Elizabeth, Louisiana three years ago to help repair a building Boise leases. His crew was headed by one of Boise's foreman. Chris Simmons, another electrician employed at the site for a year and a half, testified that on one occasion, Boise's electrical superintendent asked him to remove a cover from a heater. The task took three to four minutes. Russell Lyons, a welder, testified concerning a few incidents in which he received instructions from Boise's foremen. In one of them, his regular foreman instructed him to work with the Boise supervisor. Greg Henderson, a Boise employee who has worked at the site for 16 years, described four occasions in which he had seen Boise foremen direct the work of some of the Employer's employees. Hershal Hamilton, another Boise employee, described a few occasions in which he had seen Boise foremen instructing employees. One occurred in 1999, another occurred nine months prior to the hearing, and it is not clear when the other two took place. Lonnie Nugent, a Boise mechanic employed at the site for 25 years, testified concerning five occasions in which he believed Boise

[4] A hoister, or heister, is a machine used to move drums of chemicals.

supervisors instructed the Employer's employees. Two occurred four or more years ago, and on one of them, it was not clear whether the Boise supervisor had in fact directed the work of some of the Employer's employees. Ken Bailey, a Boise mechanic employed at the site for 27 years, described some occasions in which he acted as a set up foreman and instructed some of the Employer's employees. These occurred in 1995, 1998, and April or May 2001.

As noted above, the petitioned-for employees receive most of their day-to-day supervision from the Employer's foremen. Site Manager Nelson estimated that of all the work that is performed by the Employer's employees at the site, one or two percent of it is supervised by Boise's foremen.

Two entities will be found joint employers if they "share or codetermine those matters governing the essential terms and conditions of employment." *TLI, Inc.,* 271 NLRB 798, 798 (1984), citing *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982) and *Laerco Transportation & Warehouse*, 269 NLRB 324 (1984). An evaluation of an entity's status as a joint employer requires an examination of its impact upon the various aspects of the employment relationship including hiring, firing, discipline, wages, benefits, hours and the assignment of work.

An examination of the above-described factors shows that the Petitioner has failed to establish that Boise is a joint employer of the petitioned-for employees. The Employer is solely responsible for the hiring and discharge of its employees. Boise's role in the disciplinary process has been minimal at best. The Petitioner could only present evidence of two occasions in which Boise may have played a role in the discipline of the Employer's employees. The record does not establish that Boise either requested or had

the final say over the discipline that was meted out. The Employer has its own job progression policies, and there is no evidence that Boise has ever played a role in the promotion of the Employer's employees. While Boise retains the right to reject both individual and across-the-board wage increases, the Board has found this type of control to be within the right of the primary contractor "to police reimbursable expenses under its cost-plus contract. " *Hychem Constructors, Inc.,* 169 NLRB 274, 276 (1968). The Employer is solely responsible for the establishment and administration of the benefits its employees receive.

The evidence that Boise's supervisors have trained the Employer's employees consists of a few isolated instances and is not enough to overcome the substantial amount of evidence that the Employer is by and large responsible for training its employees. As noted above, the Employer maintains its own offsite training facility and the on-the-job training its employees receive is, for the most part, provided by the Employer's supervisors.

With regard to the day-to-day supervision of the Employer's employees, the Board has held that "evidence of minimal and routine supervision of employees, limited dispute resolution authority, and the routine nature of work assignments" is "insufficient to establish a joint employer relationship." *Laerco Transportation and Warehouse*, 269 NLRB 324 (1984). *International Brotherhood of Teamsters, AFL-CIO (Pennsy Supply, Inc.)*, 313 NLRB 1148, 1161 (1994). The instances in which Boise has helped direct the work of the Employer's employees are isolated and sporadic. Several of the examples furnished by the Petitioner were remote in time in relation to the hearing. In several others, the Employer's foremen directed employees to report to one of Boise's managers,

who would then explain what needed to be done. The fact that they sometimes remained in the area and inspected the work when it was completed, does not demonstrate joint employer status. See *Southern California Gas Co.*, 302 NLRB 456, 462 (1991).

As is the case with the supervision of work, occasions in which employees from the two companies have worked together are isolated. In total, the record contained only two instances in which this occurred, and one of them involved an emergency.

Likewise, the evidence regarding the tool rooms and the storeroom is insufficient to establish a joint employer finding. The Employer maintains its own tool room, and its use of Boise's tool room is limited to those occasions that the Employer's employees are unable to locate tools in their own. The sharing of the storeroom is also of little significance. Inasmuch as Boise owns the machines the Employer's employees maintain, it is not surprising that Boise operates the storeroom where parts for those machines are kept. The sharing of a hoister is also of little consequence. The site contains 25 such pieces of equipment and the sharing of one of them is insufficient to demonstrate that employees of the two companies interchange equipment on a meaningful basis.

Based on the above, I find that the Petitioner has failed to establish that Boise shares meaningful control over the hiring, firing, discipline, benefits or supervision of the employees in the petitioned-for unit. I thus find that Boise is not a joint employer of the employees the Petitioner seeks to represent.

The stipulations of the parties and the record as a whole shows that during the past year, the Employer purchased, and received at the site, goods and materials valued in excess of $50,000 directly from points located outside the State of Louisiana. Based

thereon, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the act to assert jurisdiction herein.

3. The labor organization involved seeks to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer.

5. The Petitioner seeks to represent the approximately 80 maintenance employees employed by the Employer at the site. By and large, the parties agree upon the composition of the unit. However, the Employer contends that the unit should include the quality control employee. The Petitioner contends that this individual is an agent of the Employer and lacks a community of interest with the unit employees. The Employer also maintains that the formula set forth in *Daniel Construction Company*[5] should be utilized to determine voter eligibility. It goes on to argue that inasmuch as the use of *Daniel* formula will enfranchise 200 additional employees, many of whom will be unavailable to vote by person, the election should be conducted by mail ballot. The Petitioner argues that the use of the *Daniel* eligibility formula is inappropriate in this case and that, accordingly, the election should be conducted by manual ballot.

QUALITY CONTROL EMPLOYEE

The Employer employs one quality control employee (QC employee) at the site. This individual inspects and evaluates welds. Maricle testified that when the QC employee finds a substandard weld, he directs the welder to redo the weld. Nelson testified that the QC employee can issue written warnings to welders who make substandard welds without having the warnings approved by foremen. When a welder

receives a warning, he is reassigned to less demanding welds. There is no evidence that any of these warnings have ever served as the independent basis for further discipline. The QC employee prepares reports, which the foremen review and utilize while making job assignments.

The QC employee is paid on an hourly basis. However, in contrast to the other hourly employees, who wear blue hard hats, he wears a white hard hat.

The Quality Control employee was not named in the record and did not testify. Nor were any of the warnings produced by the QC employee placed into evidence. Insofar as the record contained little information concerning his working conditions, I find the evidence is insufficient to determine whether the QC employee shares a community of interest with the other employees in the unit. Accordingly, I direct that the QC employee vote subject to the challenged ballot procedure.

DANIEL FORMULA

As earlier noted, the contract between the Employer and Boise provides that the Employer will provide services "in connection with expansions and modifications of existing production facilities, construction of new production facilities, and/or various other construction projects." Much of the work performed by the Employer's employees falls into crafts often associated with the construction industry. These crafts include painting, electrical work, the operation of cranes, scaffolding, pipefitting, welding, and instrument fitting. Some of the Employer's employees work in a blast yard while others work in various parts of the mill as their services are needed. In the blast yard, employees use a sandblaster to remove paint from equipment and then repaint the

[5] 133 NLRB 264 (1961).

equipment. Blast yard employees typically work on beams, catwalks, handrails, and firehouses.

Several of the Employer's employees who testified described their duties. Chris Simmons, an electrician, stated that he performs preventive maintenance on drive motors and on cranes. His duties include cleaning all contacts and contactors, taking amp readings, and blowing out the equipment. Blowing out the equipment involves the use of air hoses to clean resister banks and the brushes of motors. Charles Cooley, a maintenance mechanic and a millwright, testified that his duties include rebuilding pumps, "changing out" pumps, "changing out" bearings, performing motor and pump alignments, and working on aerators. He asserted that his crew repairs one of the paper machines regularly that he receives one to ten assignments a day. Paul Laughlin, a mechanic, testified that his duties include changing pumps and catwalks and repairing V-drain covers.

The record shows that there are shutdowns approximately three times a year. During shutdowns, equipment is taken out of operation and repaired. The last two shutdowns lasted ten days. The record is clear that some of the work done during shutdowns is performed by temporary employees who are laid off when the shutdown ends. However, the Employer did not present payroll records to show how many employees it had hired and laid off during the last two years. When hiring employees to work during shutdowns, the Employer gives preference to former employees who received favorable performance ratings. The record reflects that some employees who initially worked for the Employer during shutdowns were subsequently hired as

permanent employees. Site manager Nelson testified that work was done on boiler and "cold outages" during the most recent shutdowns.

The Employer contends that it is a construction industry employer that employs approximately 5000 employees nationwide. It maintains that because it is engaged in construction, the use of the *Daniel* formula is appropriate regardless of the work being performed at the site in question. It further argues that even if an analysis of the work being done at the site is appropriate, it would qualify as construction industry work.

The Board has defined construction work as the combining of materials to form, make, or build a structure. *Carpet, Linoleum and Soft Tile Local 1247 (Indio Paint and Rug Center),* 156 NLRB 951 (1966). In *Steiny and Co*., 308 NLRB 1323 (1992), the Board noted that many construction industry projects use a combination of more or less permanent employees and sporadic or temporary workers. It determined that the use of the *Daniel* formula best balanced the Board's objective of making its election processes available to a large number of workers while assuring that the more sporadic employees who would be enfranchised would have an adequate community of interest with the permanent employees employed at these projects. In *Steiny* the Board declined to establish another formula to determine when the application of the *Daniel* formula is appropriate. The Board stated that "application of the *Daniel* formula itself will, to a substantial extent, answer the question whether a particular construction employer is similar or dissimilar to an industrial employer, or whether it operates with or without a stable core of employees." *Steiny*, 308 NLRB at 1327.

Taking the above factors into consideration, I find no merit in the Employer's argument that an analysis of the work being performed at the site is unnecessary. At the

outset, it is noted that the Employer's contention is lacking in consistency. While one can only arrive at the conclusion that the Employer is a construction company by examining the work it predominantly performs at its various sites, the Employer maintains that an examination of the work performed at the petitioned-for location is inappropriate. Moreover, if the Employer performed no construction work at the site, and only used permanent employees, such as mechanics, janitors and secretaries, it would not be necessary to utilize the *Daniel* formula. It is the performance of construction industry work that warrants consideration of the above-described eligibility formula. In the instant matter, there is virtually no evidence that any work that can be described as the combining of materials to form or build structures is performed at the site. Although the contract provides that the Employer will perform services "in connection with expansions and modifications of existing production facilities, construction of new production facilities, and/or various other construction projects" there is no evidence that it has done so. The record indicates that the Employer's principal function at the site is to repair and maintain equipment. All the work performed during past shutdowns involved the repair of existing equipment. There is no evidence that the Employer has performed any work, even during past shutdowns, in connection with the expansion of Boise's facilities or the construction of new facilities. The Employer did not provide any documentary evidence, such as payroll or other records, which would corroborate its assertion that its work force is characterized by the type of intermittent employment typical of the construction industry. Inasmuch as I find that the Employer is not engaged in construction work at the site, I will not utilize the *Daniel* formula to determine voter

eligibility. Rather, I will use the traditional voter eligibility formula that the Board utilizes for industrial employers.

MAIL BALLOT

Inasmuch as I have determined that the use *Daniel* formula is not appropriate for this case, I find that a fair election may be conducted through the use of Board's traditional manual voting procedures.

As noted above, with the exception of the above-described areas of contention, the parties agree upon the composition of the unit. Accordingly, I find the following unit appropriate for the purposes of collective bargaining:

> All maintenance employees, including boilermakers, carpenters, crane operators, equipment operators, electricians, instrument fitters, instrument technicians, laborers, mechanics, millwrights, painters, pipefitters, scaffold builders, structural ironworkers, welders, and tool room attendants, employed by BE&K Industrial Services, a division of BE&K Construction Company, a wholly-owned subsidiary of BE&K, Inc. at the Boise Cascade Corporation facility in DeRidder, Louisiana excluding all office clerical employees, guards, professional employees and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12

months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by Paper, Allied-Industrial, Chemical and Energy Workers, Local 4-1226.

LIST OF VOTERS

In order to insure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision, four (4) copies of an election eligibility list, containing the full names and addresses of all the eligible voters, shall be filed by the Employer with the undersigned who shall make the list available to all parties to the election. No extension of time to file this list shall be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. *North Macon Health*

Care Facility, 315 NLRB No. 50 (1994). In order to be timely filed, such list must be received in the New Orleans Regional Office, 1515 Poydras Street, Suite 610, New Orleans, Louisiana 70112-3723 on or before December 19, 2001.

NOTICE POSTING REQUIREMENT

According to Board Rules and Regulations, Section 103.20, Notice of Election must be posted in areas conspicuous to potential voters for a minimum of three working days prior to the date of election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed.

NOTICES OF ELECTION

Please be advised that the Board has adopted a rule requiring that election notices be posted by the Employer at least three days prior to an election. If the employer has not received a notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An Employer shall be deemed to have received copies of the election notices unless it notifies the Regional office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. ***Club Demonstration Services***, 317 NLRB 349 (1995). Failure of the employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board,

addressed to the Executive Secretary, 1099 14th Street N.W., Washington, D.C. 20570. This request must be received by the Board in Washington by December 26, 2001.

Dated this 12th day of December 2001, at New Orleans, Louisiana.

/s/ *Curtis* A. Wells
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